UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-1863

UNITED STATES OF AMERICA
v.
LONEY, EDWARD
Appellant

Appeal From the United States District Court
For the Eastern District of Pennsylvania
(D.C. Criminal No. 79-00250-02)

Argued January 12, 1982
Before HUNTER, HIGGINBOTHAM, *Circuit Judges*,
and ACKERMAN,* *District Judge*

---

*Honorable Harold A. Ackerman, United States District Judge for the District of New Jersey, sitting by designation.

JUDGMENT ORDER

After considering the contentions raised by appellant, to-wit, that the court erred in:

1. failing to suppress the fruits of unconstitutional, warrantless searches;
2. improperly admitting evidence tending to show appellant's quilt of an offense for which he was not charged;
3. improperly admitting statements of appellant's alleged co-conspirator without independent non-hearsay evidence of the existence of the conspiracy and appellant's participation therein;
4. improperly admitting evidence concerning a bottle and the contents thereof seized from appellant when the bottle and contents had been destroyed by government agents;
5. improperly charging the jury as to the law of conspiracy,

It is ADJUDGED AND ORDERED that the judgement of the district court be and is hereby affirmed.

By The Court,

James Hunter, III, *Circuit Judge*

Attest:

Sally Mrvos, *Clerk*

Feb. 16, 1982

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-1863

UNITED STATES OF AMERICA,
v.
LONEY, EDWARD,
Appellant

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER and BECKER, *Circuit Judges*

The petition for rehearing filed by

Appellant

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By The Court,

James Hunter, III, *Judge*

May 10, 1982

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA	:	NUMBER
v.	:	81-1863
EDWARD LONEY, Appellant	:	(CRIMINAL CASE)

SUGGESTION FOR REHEARING OR REHEARING EN BANC BASED ON PENDENCY OF CONTROLLING CASE ARGUED BEFORE SUPREME COURT ON MARCH 1, 1982

Appellant, by counsel, respectfully represents:

1. That, Appellant incorporates herein by reference the arguments set forth in the Petition for Rehearing and Suggestion for Rehearing En Banc filed on March 2, 1982, a copy of which is attached hereto as Exhibit "A".

2. That, by letter dated March 12, 1982, Appellant sought to advise This Court that the Supreme Court's future opinion in *United States v. Ross*, 30 Crl 2435, a matter in which argument was hearing on March 1, 1982, would most certainly bear directly upon the Fourth Amendment issues raised in this appeal, inasmuch as that matter also involves a container search conducted at a time when the container was in exclusive police control. A copy of counsel's letter dated March 12, 1982 is attached hereto as Exhibit "B".

3. That, Appellant's Petition for Rehearing and Suggestion for Rehearing En Banc was denied by Order dated March 15, 1982, a copy of which is attached hereto as Exhibit "C".

4. That, since counsel's letter of March 12, 1982 would not have reached the Clerk until March 15, 1982, it is obvious that the Court did not have the opportunity to consider that letter before entering its Order dated March 15, 1982.

WHEREFORE, Appellant respectfully requests that this case be reheard so that the Court may reconsider this matter in light of the Supreme Court's future opinion in *United States v. Ross*.

STEPHEN ROBERT LaCHEEN
Attorney for Appellant

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA	:	NUMBER 81-1863
v.	:	
EDWARD LONEY, Appellant	:	(CRIMINAL CASE)

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

Appellant, by counsel, respectfully represents:

1. That, on February 16, 1982 a panel of This Court affirmed the judgment sentence entered by the District Court in the above matter.

2. That, Appellant respectfully petitions This Court for a rehearing of the appeal, to submit once again the argued position on the issues raised therein and, in particular, to call the Court's attention to the following matters:

(a) Appellant's Fourth Amendment rights were violated when federal agents conducted a warrantless search of his wallet several hours after it had been seized from him incident to arrest, at a time when it was in the agents' exclusive control. The sweep of a lawful search incident to arrest is not so broad as to permit a search of a wallet, a repository of personal effects in which there is a reasonable expectation of privacy, several hours after it has been reduced to the exclusive control of federal agents, where there is no reason whatsoever to believe that it contained weapons, contraband or evidence of crime.

(b) Appellant's Fourth Amendment rights were violated when federal agents analyzed, without a warrant, the contents of a bottle seized from his van. Although the agents may have had a right

tc seize the bottle, they had no right to search it without a warrant, since the nature of its contents were not obvious.

(c) Appellant's due process rights were violated when the hearsay statements of his alleged co-conspirator were admitted without independent non-hearsay evidence of the existence of the conspiracy and the Appellant's participation therein. In this case the indictment charges a conspiracy between Appellant and another to sell drugs to an informant. The independent evidence tended to show only that Appellant sold drugs to his alleged co-conspirator; there was no non-hearsay evidence to suggest Appellant's participation in a broader conspiracy to distribute those drugs to third parties.

3. That, the errors complained of can in no way be deemed harmless inasmuch as a prior trial in this matter resulted in a hung jury.

4. That, the Supreme Court has scheduled argument in the matter of *United States v. Ross*, in which the Opinion below is reported at 655 F.2d 1159 (C.A.D.C. 1981). That matter involved the station-house search of a zippered leather pouch and paper bag found during the search of a car trunk. The Supreme Court's Opinion in that case may well shed considerable light upon the Fourth Amendment issues involved in this appeal.

WHEREFORE, Appellant respectfully requests that this case be reheard and suggests that such rehearing be before the Court *en banc*.

STEPHEN ROBERT LACHEEN
Attorney for Appellant

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA	:	NUMBER
v.	:	81 - 1863
EDWARD LONEY, Appellant	:	(CRIMINAL CASE)

STATEMENT OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to decisions of the United States Court of Appeals for the Third Circuit or the Supreme Court of the United States, and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this Court, to wit, the panel's decision is contrary to the decision of This Court or the Supreme Court in *United States v. Chadwick*, 433 U.S. 1 (1977), *Arkansas v. Sanders*, 442 U.S. 753 (1979), *New York v. Belton*, __ U.S. __, 29 CrL 3124 (1981), *Robbins v. California* __ U.S. __, 29 CrL 3115 (1981).

STEPHEN ROBERT LaCHEEN
Attorney for Appellant

Exhibit A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA	:	NUMBER
v.	:	81 - 1863
EDWARD LONEY, Appellant	:	(CRIMINAL CASE)

CERTIFICATIONS

I HEREBY CERTIFY that I have served two copies of the foregoing Petition for Hearing and Suggestion for Rehearing En Banc upon MARY C. SPEARING, ESQUIRE, Assistant U.S. Attorney, 3310 U.S. Court House, 601 Market Street, Philadelphia, Pennsylvania, 19106, by mailing them postage prepaid, on this date.

I HEREBY CERTIFY that I am a member of the Bar of This Court.

STEPHEN ROBERT LaCHEEN
Attorney for Appellant

March 2, 1982

Exhibit A

LaCHEEN & ALVA
ATTORNEYS AND COUNSELLORS AT LAW

*STEPHEN ROBERT LA CHEEN
DANIEL-PAUL ALVA
ANNE M. DIXON
BARNABY C. WITTELS
KENNETH M. DUBROW

31st FLOOR LEWIS TOWER BUILDING
15TH AND LOCUST STREETS
PHILADELPHIA, PENNSYLVANIA 19102

(215) 735-5800

*Member Florida Bar also

March 12, 1982

Sally Mrvos, Clerk
U.S. Court of Appeals
21400 U.S. Court House
601 Market Street
Philadelphia, Pa. 19106

Re: U.S.A. v. Edward Loney
C.A. #81-1863

Dear Mrs. Mrvos:

In the Petition for Rehearing filed in the above matter, I suggested that the Supreme Court's future decision in *United States v. Ross* may be dispositive of the Fourth Amendment issues presented in this appeal.

In this connection, I would like to point out to the Court that the Ross matter has now been argued in the Supreme Court and that one of the focal points of the argument was that the search was conducted at a time when the container was in the exclusive police control. *See 30 CrL.* 2425, March 10, 1982.

Thus, it appears most certain that the opinion in *United States v. Ross* will bear directly on the Fourth Amendment issues in this case.

Thank you.

Very truly yours,

ANNE M. DIXON

AMD/c
cc: Hon. James Hunter, III
Hon. A. Leon Higginbotham, Jr.
Hon. Harold A. Ackerman
Mary C. Spearing, Esquire, AUSA

Exhibit B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-1863

UNITED STATES OF AMERICA
v.
LONEY, EDWARD,
Appellant

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER and BECKER, *Circuit Judges*

The petition for rehearing filed by

Appellant

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

James Hunter, III, Judge

March 15, 1982

Exhibit C

PFV:RRS:dad
File No.: 79-1225

IN THE
UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	: CRIMINAL NO.:
v.	: 79-250
JOAN BAISCH	: DATE FILED:
EDWARD LONEY	: VIOLATION: 21
	:U.S.C. §841(a) (1)
	: Distribution of a
	: Controlled Sub-
	: stance—1 Count
	: 21 U.S.C. §846
	: (Conspiracy to
	: Distribute a Con-
	: trolled Substance
	: — 1 Count)

INDICTMENT

THE GRAND JURY CHARGES THAT:

On or about October 29, 1979, at Philadelphia, in the Eastern District of Pennsylvania, EDWARD LONEY and JOAN BAISCH, knowingly and intentionally did unlawfully distribute approximately 55.39 grams of methamphetamine, a Schedule II non-narcotic drug controlled substance.

In violation of Title 21, United States Code, Section 841 (a) (1), and Title 18, United States Code, Section 2 (a).

THE GRAND JURY FURTHER CHARGES THAT:

On or about October 29, 1979, at Philadelphia, in the Eastern District of Pennsylvania, the defendants, JOAN BAISCH and EDWARD LONEY, wilfully and knowingly did combine, conspire, confederate and agree

to distribute methamphetamine, a Schedule II non-narcotic drug controlled substance, in violation of Title 21, United States Code, Section 841 (a) (1).

OVERT ACTS

In furtherance of the conspiracy and to effect the objects thereof, the defendants performed the following overt acts in the Eastern District of Pennsylvania:

1. On or about October 29, 1979, at Philadelphia, JOAN BAISCH met with Joseph Pellegrini and negotiated a sale of methamphetamine.

2. On or about October 29, 1979, EDWARD LONEY met with JOAN BAISCH at the residence of JOAN BAISCH, 9250 Angus Place, Philadelphia, Pennsylvania.

3. On or about October 29, 1979, at Philadelphia, JOAN BAISCH met with Joseph Pellegrini a the residence of JOAN BAISCH, 9250 Angus Place, Philadelphia, Pennsylvania and delivered to him approximately 55.39 grams of methamphetamine.

4. On or about October 29, 1979, at Philadelphia, JOAN BAISCH received from Joseph Pellegrini $2,400 in payment for the methamphetamine.

In violation of Title 21, United States Code, Section 846.

A TRUE BILL:

_____

FOREMAN

_____

PETER F. VAIRA
United States Attorney

IN THE
UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
v.	:	CRIMINAL
JOAN BAISCH and		NO. 79-250
EDWARD LONEY	:	

ORDER

For the reasons set forth in the accompanying memorandum opinion, it is hereby ORDERED that defendant Joan Baisch's motion to suppress evidence is GRANTED and defendant Edward Loney's motion to suppress evidence is DENIED.

By the Court:

/s/ Van Artsdalen
J.

February 29, 1980.

IN THE
UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
v.	:	NO. 79-250
EDWARD LONEY	:	SUR CHARGE: 21 USC 846, et al.

MOTION FOR JUDGMENT OF ACQUITTAL

TO THE HONORABLE DONALD W. VanARTSDALEN, JUDGE OF THE SAID COURT:

Defendant above named by his Attorney, respectfully moves the Court to order a judgment of acquittal herein on the following grounds:

1. The evidence is insufficient to sustain a conviction herein.
2. The failure to preserve Jencks Act Material and the destruction of evidence constitute a denial of due process and/or warrants an acquittal pursuant to the supervisory powers of This Court.

WHEREFORE, Defendant moves the Court to enter a judgment of acquittal herein.

Respectfully Submitted,

STEPHEN ROBERT LaCHEEN
Attorney for Defendant

January 30, 1981

IN THE
UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
v.	:	NUMBER 79-250
EDWARD LONEY	:	SUR CHARGE:
	:	21 USC 846, et al

MOTION FOR NEW TRIAL

TO THE HONORABLE DONALD W. VanARTSDALEN, JUDGE OF THE SAID COURT:

Defendant above named by his attorney, respectfully moves that the Court grant him a new trial herein for the following reasons:

1. The Court erred in ruling on the admission and exclusion of evidence, including, *inter alia:*

a. admitting evidence of the tin foil, the bottle and contents thereof, and the formulae, seized in violation of Defendant's Fourth Amendment rights;

b. admitting evidence of an offense for which Defendant was not charged;

c. admitting evidence of hearsay declarations against Defendant;

d. admitting evidence concerning a bottle and the contents thereof seized from Defendant, when the bottle and contents had been destroyed by the Drug Enforcement Administration without notice to the Defendant and in violation of DEA Guidelines.

2. The Court erred in charging the jury with regard to the law of conspiracy.

WHEREFORE, Defendant prays for a new trial herein.

Respectfully Submitted,

_____

STEPHEN ROBERT LaCHEEN
Attorney for Defendant

January 30, 1981

IN THE
UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL
v.	:	#79-250-1
EDWARD LONEY and	:	#79-250-2
JOAN BAISCH	:	
	:	TESTIMONY OF
Defendants.	:	ELLIS M. HERSHOWITZ

Philadelphia, Pennsylvania
January 15, 1980

BEFORE:
THE HONORABLE DONALD W. VanARTSDALEN, U.S.D.J.

APPEARANCES:
RUTH V. SIMON, ESQ.
Assistant U. S. Attorney
For the Government

STEPHEN LaCHEEN, ESQ.
Attorney for Defendant Loney

MARC RICKLES, ESQ.
Attorney for Defendant Baisch

EMERY C. TOMPKINS, C.S.R., R.P.R., C.P., C.M.
OFFICIAL COURT REPORTERS
Room 2722
U.S. Court House
Philadelphia, Pa. 19106

WAlnut 5-9480

E. M. HERSHOWITZ — direct:

So he told her that he didn't see him.

Q. Based on your radio call to other agents, did other agents in fact arrest Edward Loney?

A. Yes.

Q. About what time was the arrest made?

A. Just after four-fifty P.M.

Q. Did you have occasion later that evening to perform an *inventory search*?

MR. LaCHEEN: Objection to the characterization. I don't know what an inventory search means.

MS. SIMON: Perhaps, your Honor, if I would recall Agent Hershowitz after the testimony of the arresting officer.

MR. LaCHEEN: I have no problem with that. I don't know what an inventory — did somebody give you some stuff that you took from the van?

THE WITNESS: That's correct.

BY MS. SIMON:

Q. Approximately what time did you have occasion to search the possession taken from Mr. Loney?

A. After seven-thirty P.M., probably around 7:30, quarter to eight, something like that.

Q. Where did this take place?

A. In our office.

Q. What, if anything, did you find?

A. Well, there were twenty-one $100 bills wrapped with four other $100 bills, like twenty-four bills together, folded over, and there was a second stack of money which contained I think $678. This was seized by Agent Broden from Mr. Loney's pockets. Additionally, Mr. Loney's wallet was seized, keys — he had a watch and a bottle, approximately a gallon bottle of liquid was seized from the van.

Q. Did you have occasion to compare serial numbers of the twenty-four $100 bills with the money that you had given Joseph Pellegrini that morning?

A. Yes, I did. Twenty of the serial numbers matched the ones on the money list.

Q. Did you go through his wallet *pursuant to this arrest*?

A. I did.

Q. And what, if anything, did you find?

A. There were pieces of paper containing names of chemicals, prices, quantities. There was a piece of paper containing what I believe to be the formula for making P_2P.

THE COURT: Excuse me just a minute. As I understand, the motion to suppress isn't because these articles would not be admissible evidence as such, or that the police wouldn't have the right to hold this as evidence, but rather, as I understand, the only objection is that it was all the fruits of an illegal arrest.

MR. LaCHEEN: Judge, up until the last remark the witness made I would agree with you. However, the last remark he made causes me to want to perhaps argue that particular point.

THE COURT: Go ahead.

MR. LaCHEEN: We were not advised where that stuff was until it was in his wallet, but I would have an argument about that.

THE COURT: Right.

BY MS. SIMON:

Q. Did you perform a search of the vehicle that was seized?

A. I, myself, did *the following day*, at which time *I retrieved loads of tin foil strips on the floor of the truck*.

Q. Based on your experience of the DEA, what significance, if any, would strips of tin foil have?

A. Strips of tin foil are used in the manufacture of methamphetamine.

MS. SIMON: No further questions.

CROSS-EXAMINATION
BY MR. LaCHEEN:

Q. When you sent out your direction, to whom did you send it on how to stop Mr. Loney?
A. Via a two-way radio.

E. M. HERSHOWITZ — cross

Q. Where were you, in a vehicle of yours?
A. That's correct.
Q. And somewhere near 9250 Argus Road?
A. Angus Place.
Q. Angus, I am sorry.
A. Yes, Angus Place. There is an Angus Road and Angue Place.
Q. Whom did you notify to stop Mr. Loney?
A. All the agents — well, just about everybody else was — they were following Mr. Loney.
Q. How many people are you talking about, two, ten?
A. I guess there must have been — I think at least about six, maybe.
Q. Now what specific direction did you give those people?
A. What specific direction did I give them?
Q. I asked you first.
A. All I did was to notify the surveillance team. Agent Kean was the senior agent.
Q. Did you tell him to stop and paint his car green? What did you tell him to do?
A. I advised — all I did was advise them, Agent Kean, who was there following Loney, made the decision to arrest him and stop him based on what I told him.
Q. And knowing what happened previously, you gave Agent Kean certain facts and Agent Kean then made a decision to arrest, or did you tell Agent Kean that you wanted the guy arrested? What was the direction that you gave, that's what I want to know.

A. Kean already told me that if things went according to plan, you know, what we thought would happen, Loney would be arrested after, you know, after we found out that the deal went down, so *all I did after Mr. Pellegrini came out was notify them that he, in fact, got the drugs from Miss Baisch.*

Q. Now the period of time — incidentally, going to the end first, what specifically was it that you obtained — you don't know, do you, where the stuff was in the car? You don't know where the P_2P was, or somebody else did that; correct?

A. I was told where it was, yes.

Q. Based upon what you were told by somebody else, *where was the P_2P, the bottle of P_2P?*

A. *The bottle was inside an open cardboard box sitting right next to the driver's seat.*

Q. You mean on the seat next to the driver?

A. Not on the seat, I don't believe. I believe on the floor right by the driver's seat.

Q. Where the passenger's feet would be, if there had been a passenger?

A. No. I believe my understanding was that it was like *behind the passenger's seat, right next to the driver's seat,* like off to the rear slightly.

Q. *What about the tin foil, where was that found?*

A. *All over the floor of the truck. Most of it was stuck to the floor.* Apparently something had spilled in there causing the tin foil to stick to the floor.

Q. Has anybody performed tests to determine how long that was in the trunk, do you know?

A. Not to my knowledge.

Q. No way of telling?

A. Are you referring to the tin foil?

Q. Yes.

A. Not to my knowledge, no.

Q. What about the papers that we have, 12, 13, and 14 as pages. There is a piece of paper which says 40 percent — Judge, we don't have copies of the stuff.

It would be a lot easier if you had it as well.
THE COURT: That's all right.

BY MR. LaCHEEN:

Q. Do you know where this was, where this was found?
A. Wallet.
Q. Is this something you took from the wallet?
A. Yes. All those papers were taken from the wallet.
Q. Let me see, one, two, three, four, five, all five pieces of paper which comprise these two exhibits were found in the man's wallet; correct?
A. That's correct.
Q. Now you did not ask him to empty the contents of his wallet, did you?
A. No, I did not.
Q. You took the wallet from him?
A. No. Agent Broden did.
Q. *When you got the wallet, had the contents been removed, or was that something that you did?*
A. *Something that I did.*
Q. Now this was about 7:30 in the evening?
A. *7:30, eight o'clock,* somewhere around there.
Q. Was that *at DEA headquarters?*
A. That's correct.
Q. And Mr. Loney at that time was there?
A. *Mr. Loney had already been transported to the Roundhouse.*
Q. He was not striking distance of his wallet then, was he?
A. No, not at that time point, no.
Q. *What did you look in his wallet for?*
MS. SIMON: Objection, your Honor.
THE COURT. Overruled.
THE WITNESS: *I looked in his wallet for basically intelligence information.*

BY MR. LaCHEEN:

Q. Any reason *why you didn't go get a search warrant* if you wanted to look in his wallet?

A. Well, I didn't think it was necessary based on the fact that *it was seized pursuant to his arrest.*

Q. I can't ask you anything else on that issue.

Your surveillance started at about nine o'clock in the morning some time?

A. No. My surveillance was later, approximately ten o'clock.

Q. You started by meeting Pellegrini at Gino's, had conversation with him, and then he went his way and you went to your surveillance or something like that; is that correct?

A. Yes. He went inside.

Q. I want to get a little summary before I start asking you some questions. I am not trying to lead you into a trap.

Basically he was at the house three times on that day, each time for something like five or ten minutes; is that correct?

A. He was there three times, yes.

Q. And you were surveiling 9250 Angus at what period of time, if you recall?

A. I was there each and every time that he, Mr. Pellegrini went in. I was also there for some time after,

IN THE
UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
v.	:	NO. 79-00250-002
EDWARD LONEY	:	POST TRIAL MOTIONS

Philadelphia, Pennsylvania
April 1, 1981

Before HON. DONALD W. VanARTSDALEN, J.

APPEARANCES:

L. MARC DURANT, ESQ.,
Assistant United States Attorney
For the Government

STEPHEN LaCHEEN, ESQ.,
Counsel for the Defendant

Emery C. Tompkins, CSR, RPR, CP, CM.
OFFICIAL COURT REPORTERS
Room 2722
U.S. Courthouse
Philadelphia, Pa. 19106
WAlnut 5-9480

THE COURT: I believe that this case presents at least two rather close questions. The one is my pretrial ruling on the suppression of the evidence as to what was found in the wallet taken from the defendant at the time that he was arrested, although the search took place sometime thereafter, and was according to Officer Hershowitz, not an inventory search, but a search for evidence, and, in fact, there was a formula obtained there, which there was testimony was a formula for making P2P, which was relevant, and certainly was a factor in the evidence in this case for which the jury may have given considerable attention.

I denied the motion to suppress largely on the basis of United States vs. Edwards, 415 U.S. 800, decided in 1974.

There have been cases from the Supreme Court of the United States since that date, that I think present serious questions as to the ruling that I made; Arkansas vs. Sanders, 442 U.S. 753; United States vs. Chadwick, 433 U.S. 1, being two of the primary ones.

Also I think that some of the language in the very recent case, from the Court of Appeals, of United States versus James Bush, et al., this is involving a forfeiture of currency, and the forfeiture of motor vehicle, which is somewhat of a different situation, in which the court filed an opinion on March 24, 1981. It would be docketed, I believe, as slip opinion 80-1116, 1168, 1751, and 1761, in which they upheld a search, although I said in that case it involved a question of a forfeiture, which is quite a bit different situation than what we have here.

Nevertheless, until there is some clear decision from the Court of Appeals, I will abide by the decision that I heretofore made, and therefore the motion to grant a new trial, or to dismiss the indictment by reason of having allowed that evidence to come in will be denied.

The other issue is the question of the destruction of evidence, or potential evidence, being a bottle containing what was testified to as P2P, that was seized at the time of the arrest.

I have previously held that the seizure was proper. I abide by that and continue to abide by that prior ruling that I made.

It appeared at the time of the trial that the bottle was, shortly before the trial, the contents of the bottle and the bottle were destroyed deliberately by the DEA agents, apparently as a matter of routine operation, but in direct violation of a departmental directive that had come down shortly before, but approximately two months before, that before such evidence should be destroyed, counsel for the defendant should be notified, and clearly there was no notification.

I don't know whether this made any difference in the outcome of the case. I doubt very seriously that it did, but that really is not the proper test. I think the sole question, in view of the fact that there are many cases that have held that destruction of evidence, through negligence, or bureaucratical error, and at least where it's not done deliberately for the purpose of preventing evidence that he wished to have, have held that this does not require a sanction such as dismissal of the charges.

There is no evidence in this case that the destruction was for the purpose of gaining some tactical advantage in the course of the trial.

It seems to me that violation of administrative regulations, although they may be condemned and there may be certain rights that they have, I don't think that that creates any type of due process right in the defendant, and certainly under United States vs. Morrison, it would not in any event, justify the dismissal of the indictment.

Conceivably it could lead to the suppression of any evidence concerning the bottle or the contents of the bottle, by reasoning analogous to the so-called exclusionary rule, or the excluding of evidence that is improperly obtained.

However, I don't think that that would apply because the rule of excluding evidence that has been illegally or improperly obtained has ordinarily been applied only where it has been obtained in some unconstitutional way, such as by an illegal search and seizure.

I don't think that mere violation of regulations, departmental regulations, would be sufficient to justify, for that reason alone, the suppression of the evidence, and therefore, although, again, I think that it is a question not without doubt, I will deny the motion for a new trial, and/or dismissal of the indictment.

Now the defendant has raised certain other issues. I have considered all of them. I don't think that they are a proper basis for the granting of a new trial, or of a dismissal of the indictment.

So far as the question on the admissibility of the statements of Joan Baisch, I think it is clear that when all of the evidence is viewed in this case, there was sufficient evidence of the existence of a conspiracy, and there was also sufficient evidence of the fact — independent evidence — of the fact that Mr. Loney was the person who delivered the controlled substance to Joan Baisch, and I think from that the circumstances are such as to justify a jury, in finding beyond a reasonable doubt, that, in fact, he was a co-conspirator.

Certainly I think the evidence was sufficient at that point, or all of that independent evidence was sufficient to permit the statements of Joan Baisch that she made, which were clearly, if there was a conspiracy, were clearly made during the course of

the conspiracy, and as part of the conspiracy, when she telephoned to Ed's Steak House. In that connection, of course, there was clear evidence, or there was evidence, at least, that Mr. Pelligrini, I believe it was, actually saw the named steak house with some phone number, that Miss Baisch examined and looked at before dialing the number when she made the telephone call to a person whom she identified at that time, I believe, only as Eddie.

Consequently the motion for a new trial and for dismissal of the indictment will be denied.

Now I did not, in this case, order a presentence report as of yet. I will presently order and direct that a presentence report be obtained, and I would like to set a date for sentencing.

Will you be here April 28th?

MR. LaCHEEN: I would have come back three days before that. How about the first week of May, if that's not inconvenient.

THE COURT: I want to conclude it the last week of April.

We will set sentencing for Tuesday, April 28, at 2:00 p.m.

Now I have another sentencing at 1:30, and I think it will be done by 2:00 p.m.

MR. LaCHEEN: Thank you, Your Honor.

Would Your Honor continue Mr. Loney's bail?

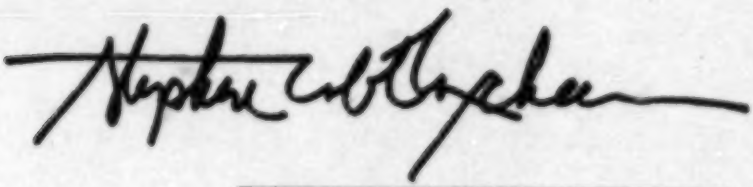
THE COURT: Mr. Loney will remain on bail as heretofore, unless there is some application by Mr. Durant. I assume there is none?

MR. DURANT: No, sir.

THE COURT: I believe there were

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that three copies of the Petition for Certiorari to the United States Court of Appeals for the Third Circuit and Appendix thereto were served upon the Solicitor General, Department of Justice, Washington, D.C. 20530, by depositing same in the mail, first class postage prepaid, on this date.



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